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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 21, 2007

CAPITAL CASE

Questions Presented for Review

1. In light of the conflicting tests adopted by the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits and the resulting patchwork of stays and dismissals in lethal injection cases across the country, what is the proper measure of timeliness for a method-of-execution claim brought by a death row inmate under 42 U.S.C. § 1983.

2. Whether the Eleventh Circuit's "unreasonable delay" standard violates Article III's case or controversy requirement where such standard: (i) ignores the fact that a method-of-execution claim does not become ripe until at least an execution date has been set or at the conclusion of federal habeas review; (ii) requires a death row inmate to anticipate the denial of habeas relief before such denial actually occurs; and (iii) subjects death row inmates to a catch-22 situation by forcing them to choose between filing an unripe claim or filing an unreasonably delayed claim.

3. Whether the balance of equities favors substantive review of Mr. Arthur's complaint where: (i) a trial from another case addressing the constitutionality of Alabama's lethal injection protocol will commence a few days after Mr. Arthur's execution; (ii) executing Mr. Arthur a few days before this trial commences risks imposing upon Mr. Arthur a method of execution that could be found unconstitutional; and (iii) the lethal injection protocols in numerous states have been found unconstitutional.

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OPINIONS BELOW

The August 10, 2007, Memorandum Opinion and Order of the United States District Court for the Southern District of Alabama dismissing Mr. Arthur's § 1983 claim ("Dismissal Order") is unreported and reprinted in the Appendix hereto at pages A1 - A13.

The September 17 2007, decision of the Eleventh Circuit affirming the District Court's dismissal ("Circuit Order") is unreported and reprinted in the Appendix hereto at pages A14 - A23.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit issued its decision on September 17, 2007. This Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article Three of the United States Constitution provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party;

> —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

The Eighth Amendment to the United States Constitution provides in relevant part: "[N]or [shall] cruel and unusual punishments [b]e inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding for redress[.]

STATEMENT OF THE CASE

A. Proceedings Below

After the conclusion of his federal habeas proceedings and before the Alabama Supreme Court set an execution date, Mr. Arthur commenced an action pursuant to 42 U.S.C. § 1983 (the "Complaint") challenging the constitutionality of the method by which Richard Allen, Grantt Culliver and other unknown employees and agents of the Alabama Department of Corrections (collectively, "the State of Alabama" or "the State") intend to execute him. Mr. Arthur sought injunctive and declaratory relief against the State of Alabama in order to prevent violations and threatened violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

Without answering the Complaint, the State moved to dismiss on June 25, 2007, on various grounds pursuant to Rule 12 of the Federal Rules of Civil Procedure. On July 16, Mr. Arthur filed a Memorandum in Opposition to the State's motion, and the State's reply brief was filed on July 26, 2007. (A3)

In an order dated August 10, 2007, the District Court granted the State's motion to dismiss, holding that the State's affirmative defense of laches was dispositive. (A3) However, instead of applying a

conventional laches analysis, which would have required the State to demonstrate unreasonable delay and prejudice, the District Court relied on "specialized equitable principles" to dispose of Mr. Arthur's claims. (A11) The District Court did not define these principles, other than to state that the initial question is whether Mr. Arthur "unreasonably delayed," and that the State need not show undue prejudice because "the equitable principles in play here do not ignore prejudice, but find it, as a matter of law...." (*Id.*) Although Mr. Arthur did not ask for a stay, the District Court concluded that Mr. Arthur failed to overcome the "strong presumption" that he was not entitled to injunctive relief in the form of a stay, and dismissed the Complaint. (A3, A13)

On September 7, 2007, pursuant to a briefing schedule twice expedited at Mr. Arthur's request, Mr. Arthur filed his appellate brief. On September 17, 2007, the Eleventh Circuit issued an opinion, over a strongly worded dissent, affirming the District Court's dismissal. Instead of providing clarification regarding the proper standard for determining "undue delay" in a lethal injection challenge, the Eleventh Circuit held that actions are untimely when filed "too late to allow for a full adjudication of the merits of [a plaintiff's] action." (A22)

While acknowledging that "the equitable considerations in each case are naturally different" (A21), the Eleventh Circuit declined to remand to the District Court to develop a record to analyze relevant equitable considerations, instead summarily

concluding that "Arthur is unable to defeat the State's motion to dismiss." (A20)

In a compelling dissent, Judge Barkett criticized the "wholly unreasonable" requirement that death row inmates "predict[] scientific data—only recently available" (A21) suggesting that Alabama's lethal injection procedure violates the Eighth Amendment. Judge Barkett also rejected as "untenable" (A21) the suggestion that Mr. Arthur "should have anticipated the denial of all relief and filed his case prior to the determination" of his habeas appeals, noting that even the State of Alabama is "not so bold and therefore will not set an execution date until after the United States Supreme Court denies certiorari review. . . ." (A25) (Barkett, J., dissenting) (emphases in original).

Mr. Arthur now petitions for review of the Circuit Order.

B. Mr. Arthur's Trial and Federal Post-Conviction Proceedings

Mr. Arthur is a death row inmate at Holman Prison who has steadfastly maintained his innocence. He is scheduled to be executed by lethal injection on **September 27, 2007, at 6:00 p.m. CDT.**

In 1991, Mr. Arthur was convicted of murdering Troy Wicker at his home in Muscle Shoals, Alabama. No physical evidence linked Mr. Arthur to the crime. Instead, his conviction was based almost exclusively on the testimony of the victim's wife, Judy Wicker, who had previously testified that a burglar killed her husband. Judy

Wicker was convicted of and sentenced to life imprisonment for the same crime. *Wicker* v. *Alabama*, 433 So. 2d 1190 (Ala. Crim. App. 1983).

At her own trial, Judy Wicker testified that an intruder burglarized her home, assaulted her, and then shot Troy Wicker. *Wicker*, 433 So. 2d at 1192-94. A police officer who arrived at the crime scene testified that he had interviewed Judy Wicker and she told him that she had been raped. These sworn testimonies were corroborated by physical injuries Judy Wicker sustained from a struggle, blood-stained clothing, torn undergarment, and a rape kit that was prepared on the day of the murder. (T.R. 365-66)[1] At Mr. Arthur's trial, Judy Wicker changed her story, claimed that Mr. Arthur had pulled the trigger, and secured an early release from her life sentence. (T.R. 787)

Mr. Arthur's conviction and sentence were affirmed on direct appeal in 1998. Notwithstanding his diligent efforts, Mr. Arthur was unable to find counsel or access either state or federal collateral proceedings before both statutes of limitations had run. In order to overcome this procedural bar, Mr. Arthur—with the assistance of pro bono counsel he was finally able to find—diligently tried to develop

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[1] This was Mr. Arthur's third trial on the same charges. His two previous trials resulted in convictions and death sentences, which were overturned on direct appeal as a result of constitutional violations. "T.R. __" denotes references to the reporter's trial transcripts from the record of Mr. Arthur's third state trial.

facts relating to his gateway claim of actual innocence and his tolling claims.

In connection with federal habeas proceedings, Mr. Arthur requested discovery relating to actual innocence, and sought to conduct DNA testing for the first time on physical evidence, including a rape kit created on the day of the murder and blood-stained clothing. The district court denied Mr. Arthur's request for DNA testing, rejected his tolling claims, and dismissed his first and only habeas petition as time-barred on December 4, 2002. The Eleventh Circuit affirmed and the United States Supreme Court denied certiorari on April 16, 2007. Accordingly, Mr. Arthur stands to be executed without ever having received *any* post-conviction review—state or federal—on the merits of his claims.

On April 17, 2007, the State of Alabama moved to set an execution date for Mr. Arthur. On May 14, 2007, Mr. Arthur filed his Complaint in the United States District Court for the Southern District of Alabama. The Alabama Supreme Court granted the State's motion on June 22, 2007, and set an execution date of September 27, 2007.

C. Jurisdiction Below

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Jurisdiction in the Eleventh Circuit was proper under 28 U.S.C. §§ 1291 because Mr. Arthur appealed from the District Court's final judgment and denial of injunctive relief.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari to Resolve the Circuit Split Regarding the Appropriate Standard for Determining the Timeliness of a § 1983 Lethal Injection Complaint.

In *Hill* v. *McDonough*, 126 S. Ct. 2096 (2006), the Supreme Court held that a death row inmate may bring an action seeking to enjoin the use of lethal injection to execute him under 42 U.S.C. § 1983. Hill filed his lawsuit four days before his scheduled execution. Although recognizing the "equitable powers" of federal courts to "dismiss suits they saw as speculative or filed too late in the day," the Court expressly noted that "the particular determinations made in those cases are not before" it. *Id.* at 2104. While *Hill* has left numerous substantive questions regarding the constitutionality of lethal injection in its wake, this Court has yet to settle the critical threshold question: what is the standard for determining the timeliness of a § 1983 method-of-execution complaint?

Since *Hill*, courts throughout the country have addressed the question of when a § 1983 lethal injection complaint is filed "too late in the day." However, without this Court's guidance, the federal courts have applied inconsistent standards, adding "another arbitrary factor into the equation of death," as one federal judge noted during the pendency of the *Hill* certiorari petition:

> [T]he dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences. We are currently operating under a system wherein condemned inmates are bringing nearly identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result.

Alley v. *Little*, 447 F.3d 976, 977 (6th Cir. 2006) (Martin, J., dissenting from denial of rehearing en banc.)

The Eleventh, Eighth, Fifth, Ninth, and Sixth Circuits have adopted disparate standards of timeliness in deciding whether and when federal courts may dismiss § 1983 method-of-execution complaints. Mr. Arthur's case presents a critical opportunity for this Court to determine finally the appropriate standard for assessing timeliness.

A. The Eleventh Circuit Has Adopted an "Unreasonable Delay" Standard.

In affirming the Dismissal Order in this case, the Eleventh Circuit moved away from a traditional laches analysis, in which defendants are required to demonstrate "1) a delay in asserting a right or a claim, 2) that the delay was not excusable, and 3) that there was undue prejudice to the party against

whom the claim is asserted," *AmBrit, Inc.* v. *Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986), in favor of undefined "specialized equitable principles." Instead of adhering to the well-established deferential Rule 12 standard, pursuant to which dismissal is "disfavor[ed]" and should be "rarely granted," *Lowrey* v. *Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997), and thereby concluded that the State could satisfy the affirmative defense of laches, the court cited applied the "unreasonable delay" concept it had developed in *Williams* v. *Allen*, No. 07-13638, 2007 U.S. App. LEXIS 19836 (11th Cir. Aug. 21, 2007), *Grayson* v. *Allen*, 491 F.3d 1318 (11th Cir. 2007), *Jones* v. *Allen*, 485 F.3d 635 (11th Cir. 2007), and *Rutherford* v. *McDonough*, 466 F.3d 970 (11th Cir. 2006). In so doing, the Eleventh Circuit did not consider the particularized facts of Mr. Arthur's case.

According to the Eleventh Circuit, "[i]n considering the dismissal of a lethal injection challenge, courts are to apply equitable principles which mandate dismissal" when a plaintiff has unnecessarily delayed in bringing his claim, "knowing full well that the discovery, evidentiary hearing, and decision on the merits that he demands could not possibly be accomplished within the short period of time between filing and the scheduled execution date." (A19 (internal quotation marks omitted)) The Eleventh Circuit did not, however, further clarify the proper standard for determining the timeliness of a lethal injection challenge, holding only that actions are untimely when filed "too late to allow for a full adjudication of the merits of [a plaintiff's] action." (A22)

Nor did the Eleventh Circuit consider that the time needed to hold evidentiary hearings and reach a decision on the merits varies among cases, and that courts, in their discretion, have the power to set schedules according to the exigencies of the cases. *See, e.g., Gen. Signal Corp.* v. *MCI Telecomms. Corp.*, 66 F.3d 1500, 1509 (9th Cir. 1995) ("district courts have discretion to impose rules to expedite completion of trials") (cited in *United States* v. *Edmond*, 52 F.3d 1080, 1100 (D.C. Cir. 1995) ("trial judge has wide discretion to adapt methods designed to expedite a trial")); *United States* v. *Pisani*, 773 F.2d 397, 403 (2d Cir. 1985). In fact, the State of Alabama has already completed discovery in another case involving issues similar to Mr. Arthur's. *See McNair v. Allen*, No. 06-695, 2006 U.S. Dist. LEXIS 78094 (M.D. Ala. Oct. 25, 2006).

Under the Eleventh Circuit's "unreasonable delay" standard, inmates such as Mr. Arthur are faulted for failing to file "in time," without receiving specific guidance as to when it is "too late" or being afforded any opportunity for fact-specific inquiries regarding the reasons for the alleged delay. Even if Mr. Arthur could show that he "had brought his suit in time to allow consideration of the merits," under the Eleventh Circuit's standard, "the strong presumption against a stay [would have] operate[d] against him" effectively rendering such presumption to be irrebuttable. (A21)[2]

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[2] Similarly, the Fifth and Eighth Circuits have applied a "strong equitable presumption" against the grant of a stay. *See*

B. The Ninth Circuit Has Adopted a Fact-Specific Inquiry.

In contrast to the Eleventh Circuit (and the Fifth and Eighth Circuits), in deciding the timeliness of a lethal injection challenge, the Ninth Circuit has rejected the general application of a "strong equitable presumption" and instead has adopted a fact-specific inquiry.

In *Beardslee* v. *Woodford*, 395 F.3d 1064, 1069-70 (9th Cir. 2005) (per curiam), the Ninth Circuit held that the district court erred in denying a stay solely because plaintiff did not file until execution was imminent. The district court had applied such presumption "solely on the basis" that plaintiff "had not filed the case until the California Supreme Court lifted its stay of execution." *Id.* at 1069. Plaintiff had filed his § 1983 complaint one month before his scheduled execution. According to the district court, because plaintiff's commencement of his action was "so close to his execution date . . . , litigation through trial is impossible unless the [c]ourt agree[d] to stay the pending execution." *Beardslee* v. *Woodford*, No. 04-5381, 2005 U.S. Dist. LEXIS 144, at *5 (N.D. Cal. Jan. 7, 2005). The district court also found that "virtually all of the

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Reese v. *Livingston*, 453 F.3d 289, 291 (5th Cir. 2006) ("a plaintiff cannot wait until a stay must be granted to enable [him] to develop facts and take the case to trial"); *Nooner* v. *Norris*, 491 F.3d 804, 809 (8th Cir. 2007) (proper inquiry is "whether [the plaintiff] could have brought his claim at such a time as to allow consideration of the merits without requiring entry of a stay") (internal quotation marks omitted).

evidence that [p]laintiff proffer[ed] here became available while a stay of execution was in place so that [p]laintiff could pursue his federal habeas corpus petition, long before" he filed his lethal injection complaint. *Id.* Rejecting the district court's finding of undue delay, the Ninth Circuit noted that "[o]nce an execution was imminent," plaintiff "acted promptly," and "pursued his claims aggressively as soon as he viewed them as ripe." 395 F.3d at 1069.

Rather than "applying a general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent," the Ninth Circuit held that "the district court should have conducted a fact-specific inquiry to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Id.* at 1070. Such a "fact-specific inquiry" conflicts with the approach adopted by the Fifth, Eighth, and Eleventh Circuits. *White* v. *Johnson*, 429 F.3d 572 (5th Cir. 2005); *Nooner*, 491 F.3d 804; *Grayson*, 491 F.3d 1318.

C. The Sixth Circuit Has Adopted a Statute-of-Limitations Rule.

Instead of adopting any equitable standards, the Sixth Circuit has adopted a statute-of-limitations rule to determine the timeliness of § 1983 method-of-execution claims, holding that such claims accrue upon the conclusion of an inmate's direct appeal of

his conviction. *Cooey* v. *Strickland*, 479 F.3d 412, 422 (6th Cir. 2007).[3]

Cooey's statute-of-limitations analysis is misguided for a number of reasons. Unlike the "classic" case of tort injury based upon harm that has already occurred, death row inmates filing method-of-execution claims seek injunctive relief against the harm that will be inflicted upon them *in the future* by the allegedly unconstitutional lethal injection protocols they seek to challenge.

As explained by Judge Gilman's dissent in *Cooey*, the majority's reasoning was flawed:

> To require a petitioner to file a § 1983 action three to five years before his or her execution in order to obtain legal review of the lethal-injection protocol strikes me as counterintuitive, unduly harsh, and just plain wrong. . . . Moreover, both the petitioners and the courts will have to manage the cognitive dissonance and inefficiency of simultaneously deciding (1) habeas petitions attacking the validity of the conviction and sentence, and (2) § 1983 actions challenging the constitutionality of the procedure used to carry out the sentence. The majority will thus force death-sentenced prisoners to pursue their habeas claims that assert their

[3] A petition for certiorari filed by the plaintiff if *Cooey* is pending.

> lack of culpability or, in some instances, their actual innocence, while simultaneously implying their guilt by requesting that the sentence imposed upon them be carried out in a constitutionally compliant manner.

479 F.3d at 429 (Gilman, J., dissenting).

While the Sixth Circuit had adopted a statute-of-limitations rule that calculates the period from the conclusion of direct review to the date on which the lethal injection complaint is filed, the standards adopted by the Fifth, Eighth and Eleventh Circuits are based upon the amount of time that remains before an inmate will be executed—a date that is subject to change and uncertainty.

In sum, the legal landscape for § 1983 lethal injection challenges consists of an inconsistent patchwork of stays and dismissals. This Court should grant certiorari to establish the appropriate measure for timeliness.

II. The Eleventh Circuit's "Unreasonable Delay" Standard Contravenes Article III's Case or Controversy Requirement.

Under the Eleventh Circuit's "unreasonable delay" standard, "waiting until the Supreme Court has denied certiorari review of a federal habeas petition or even until a certiorari petition has been pending for over three months . . . or until after the state files a motion to set the execution date is too late to avoid the inevitable need for a stay of execution and is too late to allow for a full

adjudication of the merits of his action." (A22) (internal quotations marks and citations omitted) Although the Eleventh Circuit has not yet decided precisely when a § 1983 method-of-execution claim becomes ripe, its "unreasonable delay" standard runs afoul of Article III's case or controversy requirement.

The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc. Servs. Inc.*, 509 U.S. 43, 57 n.18 (1993). It is a justiciability doctrine designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ." *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 807-08 (2003), quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967). "Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne* v. *Geary*, 501 U.S. 312, 320 (1991). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly impending*, that is enough." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (internal quotation marks omitted) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)) (emphasis added).

Mr. Arthur's injury will not occur until he is executed and thus his method-of-execution claim is not ripe for review until his execution is "certainly impending." *See Thomas*, 473 U.S. at 581. In connection with federal habeas proceedings, Mr. Arthur sought to vacate his conviction and death sentence. It was not until that litigation came to an unsuccessful close with this Court's denial of certiorari that his execution by lethal injection became imminent. Mr. Arthur filed his claim less than a month after it became ripe and before the Alabama Supreme Court set his execution date. *See Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 643 (1998) (motion for determination of competency to be executed are "unquestionably ripe" when a warrant for execution issues).

As the Eleventh Circuit has recognized, "[i]t is common practice in Alabama for the State to seek an execution date soon after the Supreme Court denies certiorari review of an inmate's federal habeas petition." *Jones*, 485 F.3d at 640 n.2. Because the State of Alabama routinely waits until such time to set an execution date, Mr. Arthur had no reason to believe that his execution was imminent before a date had been set. As Judge Barkett noted in her dissent, "the suggestion that the petitioner 'should have anticipated the denial of all relief" prior to this Court's denial of certiorari and should have filed a § 1983 complaint prior to this Court's final determination is "untenable." (A24) (emphasis in original). Moreover, the courts below improperly applied hindsight in dismissing the possibility of a grant of certiorari by this Court. The death penalty

was the subject of seven of the 68 opinions issued by this Court last Term; in six of the seven, the Court granted relief to petitioners.[1]

The Eleventh Circuit's "unreasonable delay" standard forces Mr. Arthur into a Catch-22 situation: file a method-of-execution claim before it is ripe and risk dismissal for lack of standing, or file such a claim when it becomes ripe and risk dismissal for unreasonable delay. Another equally senseless consequence of such standard is that similarly situated death row inmates would be required to litigate simultaneously their conviction and sentencing issues in this Court and pursue their method-of-execution claims in the district courts. This is especially true if, as the District Court held

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[1] *Panetti* v. *Quarterman*, 127 S. Ct. 2842 (2007) (reversing judgment and remanding to allow the district court the initial opportunity to resolve the petitioner's Eighth Amendment claim); *Uttecht* v. *Brown*, 127 S. Ct. 2218 (2007) (reversing Court of Appeals decision and reinstating death sentence); *Brewer* v. *Quarterman*, 127 S. Ct. 1706 (2007) (granting habeas relief to allow jury to respond to mitigating evidence and weigh such evidence in deciding whether the death penalty was truly deserved); *Smith* v. *Texas*, 127 S. Ct. 1686 (2007) (reversing and remanding where state appellate court erred in applying federal law to review of state habeas decision); *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654 (2007) (remanding for further proceedings where there was a reasonable likelihood that the state trial court's instructions prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence); *Ayers* v. *Belmontes*, 127 S. Ct. 469 (2006) (reinstating death sentence where jury instruction did not on its face restrict consideration of post-crime mitigating evidence).

here, the period for determining "unreasonable delay" is triggered when other inmates in the same state begin filing lethal injection suits, irrespective of the procedural posture of the plaintiff's own case. (A6-7)

Panetti v. *Quarterman*, 127 S. Ct. 2842 (2007), one of the seven death penalty opinions issued by this Court last Term, illustrates the flaw in the Eleventh Circuit's "unreasonable delay" standard. Scott Panetti was convicted of capital murder and sentenced to death despite his well-documented history of mental illness. 127 S. Ct. at 2849. In the course of his initial state and federal habeas proceedings, Panetti did not argue that mental illness rendered him incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), but raised this claim for the first time six weeks after his execution date had been set. *Id.* The district court denied the application on the merits and the Fifth Circuit affirmed. *Id.* at 2851-52. The state argued that the district court lacked jurisdiction to adjudicate Panetti's *Ford* claim because he failed to raise it in his first federal habeas application. This Court squarely rejected that argument, stating that its "implications for habeas practice would be far reaching and seemingly perverse." *Id.* (internal quotation marks and citation omitted). This is because:

> A prisoner would be faced with two options: forgo the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas

> application . . . , even though it is premature. The dilemma would apply not only to prisoners with mental conditions indicative of incompetency but also to those with no early sign of mental illness. All prisoners are at risk of deteriorations in their mental state. As a result, conscientious defense attorneys would be obliged to file unripe (and in many cases, meritless) *Ford* claims in each and every § 2254 application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any.

Id. at 2852-53.

This rationale applies with equal force to the method-of-execution claims being raised around the country. All prisoners on death row are *at risk* of being executed at some point in the future, but until an inmate is certain that he will be executed, *i.e.*, when no obstacles prevent the state from enforcing its death sentence, there is no sense in filing a method-of-execution claim. "Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'" *Panetti*, 127 S. Ct. at 2854 (quoting *Burton* v. *Stewart*, 127 S. Ct. 793, 797 (2007) (per curiam)).

Ripeness concerns for *Ford*-based incompetency claims are indistinguishable from the ripeness concerns for method-of-execution claims, because both raise Eighth Amendment challenges to a future injury that will occur only *at the time of execution*. Because Alabama, like many states, has the discretion to change its execution protocol secretly and without notice, any judgment about the constitutionality of a given protocol would be irrelevant if, in the interim, the State could change the protocol to be used to execute the inmate—just as a judgment regarding an inmate's competency to be executed well before his execution is imminent would be irrelevant. The Eleventh Circuit's "unreasonable delay" standard, which compels death row inmates to litigate method-of-execution claims—before they are certain that they will be executed at all, let alone have any knowledge of the actual protocol to be used—must be rejected for the same reasons this Court rejected the State's arguments in *Panetti*.

III. The Balance of the Equities Favors Substantive Review of Mr. Arthur's Challenge to Alabama's Lethal Injection Protocol.

Even if "specialized equitable principles" may be applied at the initial pleading stage to a death row inmate's § 1983 lethal injection challenge, the balance of such equities favors substantive review of Mr. Arthur's claims. A fair and proper consideration of equitable principles as grounds for dismissal of an otherwise valid claim requires consideration not only of the factors weighing in favor of dismissal, but also

of those factors weighing in favor of proceeding to a decision on the merits of the claim. *See, e.g.*, *Blum* v. *Caldwell*, 446 U.S. 1311, 1315 (1980) (Marshall, J.) (requiring justices to "balance the equities to determine on which side the risk of irreparable harm weighs most heavily" when considering an application for a stay pending resolution of a writ of certiorari); *Texaco Puerto Rico, Inc.* v. *Dep't of Consumer Affairs*, 60 F.3d 867, 878 (1st Cir. 1995) ("[A]n equitable factor must always be weighed in concert with other relevant factors. Moreover, as part of balancing the equities, the court looks at the conduct of both parties and the potential hardships that might result from a judicial decision either way.") (internal punctuation and citation omitted).

The issues at stake in this litigation are unquestionably important to Mr. Arthur, who stands to be executed pursuant to a protocol that he believes will result in an excruciatingly painful death—as confirmed by numerous courts. These issues should be resolved before Mr. Arthur is executed by the same means he challenges as being cruel and unusual punishment. It is beyond dispute that the State of Alabama has no valid interest in violating Mr. Arthur's constitutional rights.

A. Mr. Arthur Should Receive the Benefit of Imminent Review of and Potential Improvements to Alabama's Lethal Injection Protocol.

After Mr. Arthur filed his brief in the Eleventh Circuit, on September 7, 2007, an Alabama legislative panel approved a contract between the

Alabama Office of the Attorney General and Dr. Mark Dershwitz, a University of Massachusetts professor of anesthesiology. Under the terms of the contract, Dr. Dershwitz will review the chemical composition of drugs administered to state capital murder defendants during the execution process. The contract shall be in effect from the later of October 1, 2007 or the date of final approval by the Governor until on or before September 30, 2009. (A31, A37)

Mr. Arthur should be able to benefit, just as a prisoner with a later execution date would, from any improvements that the State of Alabama may make to its lethal injection protocol following Dr. Dershwitz's review.

Similarly, a § 1983 challenge to Alabama's lethal injection protocol brought by two other Alabama death row inmates, Willie McNair and James Callahan, is scheduled for trial on the merits in the United States District Court for the Middle District of Alabama beginning October 3, 2007. *See* Order, *McNair* v. *Allen* and *Callahan* v. *Allen*, Case Nos. 06-CV-695-WKW and 06-CV-919-WKW (M.D. Ala. Sept. 7, 2007) (A26-29). This trial will resolve for the first time the constitutionality of the lethal injection process as applied in Alabama. With the benefit of the factual exposition of McNair's and Callahan's claims at hand, resolution of Mr. Arthur's substantially similar claims will likely be able to proceed quickly. In addition, executing Mr. Arthur only days before the same issue that he raises in his own § 1983 Complaint receives long-awaited judicial

scrutiny risks imposing on Mr. Arthur a sentence that could very soon be held unconstitutional.

B. Mr. Arthur's Claim Has a Strong Likelihood of Success on the Merits.

Mr. Arthur has also demonstrated a strong likelihood of success in showing that Alabama's lethal injection protocol requires modifications in order to pass constitutional muster. Federal courts across the nation have granted a variety of forms of relief on similar claims brought by death row inmates.

For example, in *Morales* v. *Hickman*, 415 F. Supp. 2d 1037, 1046-48 (N.D. Cal. 2006), Judge Fogel held that there was undue risk that Morales would still be conscious following the administration of the anesthetic, and that California could proceed with his execution only if it either employed anesthesiologists to ensure that Morales was unconscious and remained unconscious, or used only sodium thiopental or another barbiturate or combination of barbiturates, during the execution process. The Ninth Circuit affirmed, holding that the district court did not abuse its discretion in fashioning an appropriate remedy. *Morales* v. *Hickman*, 438 F.3d 926, 931 (9th Cir. 2006).

Anderson v. *Evans* provides another example of a successful § 1983 action challenging the constitutionality of lethal injection. *Anderson* v. *Evans*, No. CIV-05-0925-F, 2006 WL 83093 (W.D. Okla. Jan. 11, 2006). The *Anderson* court denied the Oklahoma Department of Corrections' motion to

dismiss, finding that its protocol created an excessive risk of substantial injury or deprivation. 2006 WL 83093, at *4.

In *Brown* v. *Beck*, No. 5:06-CT-3018-H, 2006 U.S. Dist. LEXIS 60084, at *25 (E.D.N.C. Apr. 7, 2006), *aff'd*, 445 F.3d 752 (4th Cir. 2006) the court denied Brown's motion for a preliminary injunction, but required North Carolina to ensure that "there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure that Plaintiff is in all respects unconscious prior to and at the time of the administration of any pancuronium bromide or potassium chloride." North Carolina revised its execution protocol to address the court's concerns and Beck was executed pursuant to the revised protocol. *See also Patton v. Jones*, 193 Fed. Appx. 785, 789-90 (10th Cir. 2006) (affirming dismissal of inmate's § 1983 action, but noting that defendants allayed plaintiff's concern by "revising the protocol during the pendency of this appeal to require the personnel carrying out an execution to wait two and one-half minutes after the injection of the anesthetic before proceeding to inject the remaining two drugs called for in the protocol").

In addition, lethal injection is currently or was previously suspended in California, Delaware, Florida, Maryland, Missouri, North Carolina, South Dakota and Tennessee. *See Morales* v. *Tilton*, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006); *Jackson v. Taylor*, No. 06-300-SLR, 2006 WL 1237044 (D. Del. May 9, 2006) (enjoining execution until further order); *Jackson* v. *Danberg*, 240 F.R.D. 145 (D. Del.

2007) (certifying a class of all current and future death-sentenced prisoners in the custody of the Delaware Department of Corrections); Fla. Exec. Order No. 260 (Dec. 15, 2006) (no further death warrants will be signed until after a commission on lethal injection issues findings and the Department of Corrections makes necessary revisions); *Taylor v. Crawford*, 457 F.3d 902, 903-04 (8th Cir. 2006) (detailing finding by district court that Missouri's lethal injection protocol was unconstitutional), *appeal after remand*, No. 06-3651, 2007 U.S. App. LEXIS 12851 (8th Cir. June 4, 2007) (concluding revised lethal injection protocol is constitutional); *Berger Again Calls on Governor to Act*, US Fed. News, Apr. 3, 2007, available at 2007 WLNR 6835155 (de facto moratorium in North Carolina); Katie Brown, *Death Penalty Measure Signed*, RAPID CITY J., Feb. 27, 2007 (referencing South Dakota's new death penalty law, effective July 1, 2007, after which executions may resume); Order, *Harbison v. Little*, No. 3:06-CV-01206 (M.D. Tenn. Sept. 19, 2007) (finding Tennessee's lethal injection protocol in violation of the Eighth Amendment).

In 2007 alone, the lethal injection protocols in Florida, California, Tennessee and Georgia have been modified in response to identified constitutional infirmities. *See* Florida Dep't of Corrections, Execution by Lethal Injection Procedures (effective Aug. 1, 2007); State of California San Quentin Operational Procedure Number 0-770 Execution by Lethal Injection (revised May 15, 2007); Georgia Dep't of Corrections Lethal Injection Procedure (effective June 7, 2007); *see also* Tenn. Dep't of

Correction Execution Procedures for Lethal Injection (revised April 30, 2007). These modifications suggest that the lethal injection process in Alabama is also likely prone to unconstitutional error in its administration.

Although the end of Mr. Arthur's collateral appeals brought to a close his right to challenge his confinement and the validity of his sentence, it did not relieve the State of Alabama of its responsibility to carry out his sentence of death in a manner consistent with Eighth and Fourteenth Amendments. The Eleventh Circuit's refusal to consider the merits of Mr. Arthur's claims deprives Mr. Arthur of his right to vindicate his interest in these bedrock constitutional principles.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit with respect to the questions presented herein.

Respectfully submitted,

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